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IN THE

Supreme Court of the United States

October Term, 1933

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY - - - *Appellant*

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, and JAMES HATCHER, Members Constituting said Railroad Commission, BAILEY P. WOOTEN, Attorney General of the Commonwealth of Kentucky, City of Lexington, a Municipal Corporation and S. B. Featherstone, individually and as representing all other persons similarly situated, - - - - *Appellees.*

BRIEF FOR APPELLEES

Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Delph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson, and H. E. Stevens, et al.

INTRODUCTORY.

In behalf of the above-named Appellees, we desire to submit for consideration, certain matters of law and fact.

First, we will discuss the legal phases involved, and then we will take up the question of fact, as regards the rate issue.

2: REGARDING MOTIONS TO DISMISS APPEAL

Touching the motions heretofore made by these Appellees for dismissal of the appeal, we would respectfully suggest that those motions were presented before we were made parties Appellee by the Court. Now, that we have been made such Appellees, if, with propriety we may do so, we desire to raise anew the suggestion that because of the failure of Appellant to include us as Appellees, and within the time prescribed by law, and the rules of this Court, the appeal should yet be dismissed. (See Brief on the indicated motions and the authorities therein cited.) Under the decisions, the Court upon its own motion, when the record discloses the facts, justifying the action, may dismiss the appeal. (See cases referred to in Brief.) The supplemental record now before the Court, brought up, as a result of our being made Appellees, fully sustains our contention. We, these Appellees, are necessary parties upon appeal, but not having been made Appellees within the duly prescribed time, the dismissal of the appeal would now seem proper. A refusal so to dismiss when we only appeared specially, would not, as we believe, preclude

a dismissal after our formal inclusion as Appellees, with the bringing up of the omitted record, showing that no proper determination of the issues involved in the appeal, could be made without our being parties thereto.

In this connection, we would call the attention of the Court to the fact that, in addition to the parties named in the motion to dismiss, and deemed by the Court as necessary Appellees, there are, as shown by the supplemental record, four thousand other gas consumers of Lexington who were parties before the Railroad Commission, and who are interested in the impounded funds, and who have the same rights upon appeal as have the Appellees, named in the indicated motions. These four thousand gas consumers, have not been in any formal way, made parties to this appeal. (See supplemental record Mss. 3 and 4, and Printed Record 9.)

It is true that the movants named in the motions to dismiss the appeal intervened in the District Court, and were made parties in the District Court proceedings, while the other four thousand did not specially intervene in that Court, and were not by that Court specifically named as parties in the District Court proceeding. If, in fact, they are necessary Appellees, we would point out that it was the Appellant's obligation to bring them, first, in the District Court, and later, into this appellate proceeding.

3: THE COURT'S JURISDICTION UNDER RAILROAD COMMISSION ACT

In the District Court, these Appellees formally objected to the Court's jurisdiction to hear and determine the issues raised in this proceeding. These objections were based upon sections 201e-14 and 201e-17, Kentucky Statutes (Kentucky Acts of 1920, Ch. 61, p. 250, sec. 14), which provides as follows:

> Sec. 201e-14. COMPLAINTS OF EXTORTION AGAINST CARRIERS; COMMISSION TO HEAR; RATES TO BE FIXED; VIOLATION OF ORDER, PENALTY FOR; VENUE OF PROSECUTION; LIMITATION; DEPOSITIONS OF WITNESSES; PRODUCTION OF DOCUMENTS; PENALTY FOR FAILURE TO PRODUCE.—When complaint shall be made to the Railroad Commission accusing any * * * or natural gas company, mentioned in this act of charging or collecting or receiving extortionate rates * * * in this Commonwealth, or for the distribution, furnishing or sale of natural gas in this Commonwealth, * * * it shall be the duty of said commission to hear and determine the matter as speedily as possible, * * * Said commission shall give the Company complained of not less than ten days' notice * * * and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company is or has been guilty of extortion, said commission shall make and fix a just and reasonable rate * * * The rate fixed by the commission shall be entered and be an order on the record book of their office signed by the commission, and a copy thereof mailed to an officer or agent of the company affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should such company * * * charge, col-

lect or receive a greater or higher rate * * * than made and fixed by the said commission, * * * said company * * * shall each be deemed guilty of extortion and, upon conviction, shall be fined for the first offense in any sum not to exceed one thousand dollars; and upon a second conviction in any sum not to exceed two thousand dollars; and for a third and succeeding convictions in any sum not to exceed five thousand.

The circuit court of any county into or through which the line or lines of such company runs, and the Franklin Circuit Court, shall have jurisdiction of the offense * * * and the circuit court of any county where such offense may be committed * * * be by indictment or penal action, and shall be commenced within two years after the offense * * *

Sec. 201e-17. COMMISSION TO ENFORCE THIS LAW; PRACTICE; COURT PROCEEDINGS TO ENFORCE COMMISSION'S AWARD; NO NEW EVIDENCE HEARD; PROCEEDINGS AS IN ORDINARY CASES.—It shall be the duty of the Railroad Commission to see that every provision of this act is carried out, * * * The commission shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard in the office of the clerk of the circuit court of the county which, under the code of practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued as in the other cases against the party against whom the award shall have been rendered, requiring said party to appear in the court within the time allowed by ordinary cases and show cause why said award shall not be satisfied. If such party fails to appear judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case

> shall be tried in all respects as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission except such as the court may be satisfied by sworn testimony could not have been procured before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be at the same time, the same as in ordinary cases. (1920, c. 61, p. 250, sec. 17.)

Thus, Kentucky Statute 201e-17 specifically sets forth the procedure that must be followed by the Railroad Commission upon deciding a rate question, and also prescribes the procedure that must be pursued to enforce its order. In the instant case, an order was entered by the Railroad Commission, after determining the rate, extending for thirty days, the time in which enforcement of the rate, thus fixed, might be made. Before the ten days statutory period for lodgment of the commission record with the statutory court elapsed, that is to say, on the ninth day after the entry of the rate order, the Appellant, wholly ignoring the statutory procedure involved, filed its petition in the U. S. District Court, for the Eastern District of Kentucky, praying an injunction against any action of the railroad commission thus to lodge its record with the circuit court, to the end that enforcement of such rate order, or a new trial on the rate issue, might follow.

It is well settled that statutory provisions of the indicated character are valid. The Appelant chose to disregard those provisions in its effort to resist the rate fixed by the commission, and undertook to substitute its own plan of pro-

cedure for that fixed by law and the franchise contract. It did not permit the case to go into the prescribed State Court for a further trial and determination. It chose a method not prescribed or permitted by statute. Before the commission's report was even allowed to mature, Appellant went into the United States District Court and procured an injunctive process having for its purpose and effect, the stoppage of all further functioning of the statutory provisions in question.

Such irregular procedure, we submit, if permitted to prevail, sets aside the duly constituted procedure created by the State, and the franchise contract, for fixing rates. If every effort to adjust gas rates in Lexington, under the franchise contract, is to be attacked in this manner, the franchise provisions in question become nugatory, and endless costs and confusion must result, because under those provisions adjustment of the rates may be made every three years.

Referring to rate orders by the Kentucky Railroad Commission, the fact should be kept in mind that under the statutory provisions, covering the subject, the Commission itself, has no power of enforcing any rate fixed by it; and if the same be not accepted, or acquiesced in, by the utility involved, only the State Circuit Court can, after a new trial of the question, make enforcement of that rate, unless the court shall reject the rate; in which event the case is remanded to the Commission for further proceedings. Any subsequent rates fixed by the Commission must, in turn, be submitted, as in the first instance, to the Circuit Court for hearing and

action. See L. & N. R. R. Co. v. Greenbrier Distillery Company, 170 Ky. 775, wherein the Court, speaking of the power of the Railroad Commission, said:

> "It gathers and preserves the evidence necessary upon which to base judicial action. It collates the facts and sums up the results from the basis from which it acts, and this is presented to a court for review, with ample opportunity for each party to have his day in court before the matter is determined, and the questions between the parties are determined alone by the court. The act of the commission in making a reparation award has no enforcible effect, until it is determined by the court, that its report of the results of its investigation is correct."

In the case of Standard Computing Scale Company v. John F. Farrell, 249 U. S. 571, the court said:

> "But since the 'specification' is not in the nature of a law or regulation, the prohibitions of the Federal Constitution cannot apply."

In the case of Prentis v. Atlantic Coast Line Company, 211 U. S. 208, Chief Justice Fuller in concurring, said:

> "In my opinion, a preliminary objection is fatal to the maintenance of these bills. It appears on their faces that the Appellees did not avail themselves of the right of appeal to the Court of Appeals of Virginia, which was absolutely vested in them by the Constitution and laws of that Commonwealth. Such an appeal would have brought up the question of the alleged unreasonableness of the designated rate, and appellees cannot assume that the decision of the commission would necessarily have been affirmed."

In the case of St. Paul Gas Light Company v. City of St. Paul, 181 U. S. 142, the Court said:

> "* * * no legislative act is shown to exist, from the enforcement of which an impairment of the obligation of

the contract—within the purview of the Constitution—did or could result."

In the case of Dalton Adding Machine Company v. The State Corporation Commission of Virginia, 236 U. S. 699, the Court said:

> "The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly."

We would point out that all the charges of arbitrary conduct on the part of the Commission were denied by the answer as was the charge that the rate announced was confiscatory. (R 53-56.)

Appellant failed to introduce proof of its charges. It failed to show a confiscatory aspect to the Commission's award. It failed for the all-sufficient reason that the Statutes of Kentucky does not confer on the commission power to enforce its awards nor fix any penalization until award is accepted by the utility or approved by the Court — Kentucky Statutes 201e-17. The franchise contract provides for a temporary rate and impoundment of funds until finality to the making. No penalties could accrue against the Company until that time.

The District Court properly refused permanent injunction sought by Appellant.

4. DATE CERTAIN FOR RATE-MAKING

December 31, 1926, was agreed on by all the parties as the date certain before the Railroad Commission for the determination of a just and reasonable rate. Appellees made no agreement for the introduction of testimony concerning any gas purchases, contracted for subsequently to that date. Hence, no such testimony should be considered in determining the rate. We speak with special reference to the alleged contract of Appellant with the Petroleum Exploration Company.

The record made up before the Railroad Commission constituted the record upon which the case was tried in the District Court. Hence, all the parties and the District Court itself, were bound by the date, December 31, 1926. Furthermore, it is to be noted, as the Court states in its opinion (R. 85, 90) the parties litigant requested the Court to accept December 31, 1926, as the date certain upon which it should determine the question at issue. It is clear, therefore, that all the parties are bound by that date.

5. PETROLEUM EXPLORATION CONTRACT

The taking of testimony commenced on March 14, 1928. The contract between the Central Kentucky Natural Gas Company and the Petroleum Exploration Company was dated March 24, 1927. Therefore, because December 31, 1926, was by agreement, made the date certain for the trial of the case before both the Railroad Commission and the

lower Court, the Petroleum Exploration Contract should be excluded from consideration.

The franchise required Appellant to construct and maintain a second pipe line to an adequate gas field in Kentucky or West Virginia, section 23 (R-36.)

These Appellees contend that the making of a contract for the supply of natural gas with the Petroleum Exploration Company, for delivery at the gates of Lexington, is not a fulfillment of the contract as provided in Section 23, in that said section contemplates the construction, or the causing of the construction, of a suitable pipe line to the gas fields of West Virginia or Kentucky, to procure an ample supply of gas, and the complete management and control of said pipe line to vest in the Appellant.

This requirement certainly was not met by a mere contract between the Appellant and some independent producer. The gas line of the Petroleum Exploration Company, or any other independent producer, might be prevented from furnishing gas to the City of Lexington under any contract with the Appellant in case of insolvency, receivership or similar proceeding, as affecting the company; or, in the event of dissolution by mutual agreement of the contract between Appellant and the independent producer. On the other hand, if the indicated pipe line should be constructed by the Appellant, as provided for in the franchise, the same would constitute an asset which could be utilized as fully as any other of its assets under any conditions which might arise for the fulfill-

ment of its contract with the city to furnish an adequate supply of gas. Therefore, these Appellees believe that the contract of the Appellant with the Petroleum Exploration Company in no wise fulfills or discharges its obligation to the City of Lexington in the indicated manner.

In this connection, it may be pointed out that the right of the Appellant to charge an additional ten cents per M. cu. ft. of gas was based upon the condition precedent that Appellant would build and maintain such additional pipe line. For this reason, the lower Court was altogether justified in holding the 10c per M. cu. ft. in excess of 50c should be refunded to the gas consumers.

6. APPELLANTS' ASSIGNMENTS OF ERROR UNSUPPORTED

There is nothing in the record in support of Assignments of Error I – II – III – IV – V – VI – IX – X – XI – XV – XVII – XVIII.

Assignment VII is particularly objectionable in making assertions of fact, unsupported by the record. The attention of the court is invited to the following assertions:

> That existent line was not of sufficient capacity to comply with franchise contract.
> That Petroleum Exploration Company had developed a considerable gas field, etc.
> It was contemplated and understood at the time of said franchise that plaintiff would be required to have begun etc., a line from said Owsley County to Lexington, etc.
> It was further known and understood by the parties that

the plaintiff * * * to secure * * * additional pipe line * * * and delivery of an adequate supply of gas * * * by the Petroleum Exploration Company.

That in compliance with the franchise entered into a contract with said Petroleum Exploration Company to purchase 750,000,000 cu. ft. of gas and to pay 40c per M. cu. ft. therefor.

That the consideration for the increase of said temporary rate from 50c to 60c was the construction of a line from Lexington to the Owsley County field, etc.

That a further consideration for the increase in said rate was the additional cost of the plaintiff for the gas purchased under its contract with Petroleum Exploration Company.

That said * * * rate of 50c was increased to 60c as of December 1, 1927, and * * * plaintiff was required to purchase 750,000,000 cu. ft. of gas at 40c per M cu. ft. per annum.

These allegations introduce important considerations. Had they been presented to the Railroad Commission, and established by proof, or allowed to pass unchallenged, these Appellees could not complain. But these claims were not made there. They cannot be asserted here. The fixing of December 31, 1926 as the date certain for rate-making, made it unnecessary for these Appellees to inquire into the integrity of the contract with the Petroleum Exploration Company, or the reason that actuated the Appellant to pay that Company 40c per M. cu. ft. at that time.

THE MERIT OF THE CONTROVERSY

Something about the witnesses

This discussion will be limited to the qualifications of the witnesses, John T. Kimball and James A. Yunker who appeared for Appellant, and Lucien E. Beckner who appeared for the Appellees, to testify on the matters at issue, and the weight to be given to their testimony.

JOHN T. KIMBALL qualifies (R. 111) as an experienced valuation engineer and accountant. He does not qualify as a trained and experienced geologist. He does not qualify as a practical natural gas man,—one who is trained by experience in the exploration of natural gas-bearing lands. He does not qualify as being trained and experienced in the production of natural gas, and the transmission and distribution thereof. He does not qualify as an economist, a banker or a financier.

JAMES A. YUNKER testifies that he is 39 years old. In Appelant's original Brief, p. 81, Appellant states that James A. Yunker is a *practical* and experienced gas engineer; that he filed Exhibit "Yunker No. 1" entitled "Gas Reserves in Eastern Kentucky," and, that "since this Exhibit, and Yunker's testimony is not essential to this appeal, they were omitted by the appellant in its Statement of Evidence." At (R) (Mss 34). Cross-examination, the witness stated that at the time the report just referred to was made, he was head of the Geological Department of the Louisville Gas and Electric Company; that he is not a geologist; that he has not attended any geological school; that he has no training as a geologist. He stated that Mr. Beckner is a Consultant Geologist for the Louisville Gas and Electric Company.

LUCIEN M. BECKNER testified (R. 197) that he had been engaged in geological work for about twenty years; within the past ten or fifteen years for the Atlantic Re-

fining Company, and the Superior Oil Corporation, the Louisville Gas and Electric Company, the Texas Oil Company and some smaller companies to determine geological conditions favorable or unfavorable for the production of oil and gas in Indiana, Mississippi, Texas, Oklahoma and Kentucky, principally in Kentucky; that he had occasion to investigate the natural gas reserves in eastern Kentucky fields; that he had traveled through its fields for a period of thirty odd years; that he knows practically all of that territory.

The trial Court did not have the benefit of seeing any of these witnesses, or hearing them testify from the witness-stand, especially Mr. John T. Kimball, when he presented his conjectural claims with respect to the value of the properties, for Cost of Financing, Amortization and Extraordinary expense and generally, his willingness to testify upon belief rather than actual knowledge and experience.

THE RATE BASE

The Appellees accept the finding of the Court (R. 83) of $1,586,880. as the value (Rate Base) of that part of Appellant's property allocable to Lexington, Kentucky. However, because the Court obviously was over-generous in accepting as value "the fair reproduction cost" of the Lexington Utilities property (R. 84) we are constrained to suggest that said cost of $611,227. includes $26,650. "Organization Cost," Mss. 10 (R. 16). That amount is equivalent to 5-1/2% of the depreciated reproduction cost of $481,166. In Des Moines Gas Company v. Des Moines, 238 U. S. 153 on a depreciated reproduction cost of $1,937,402, the Master

allowed for Organization Expenses, $6,923. This amount, $6,923. is equivalent to less than (½%) one-half percent of the depreciated reproduction cost. The Master defines organization expense, as:

> "Time and money expended in the promotion of the enterprise, and the organization of the company and interesting capital therein, including, also, legal expenses, obtaining the necessary franchise, as well as the cost of incorporating the Company."

At (R 82. 83.) the trial Court said: "*Much of this evidence is conjectural*" which is apposite respecting the inclusion of approximately 5-½% of the reproduction cost of the Lexington Utilities property, for organization costs, as reflected by $26,500. We submit that this item should be reduced to an amount not exceeding $6,923.

Furthermore, included in the $611,227. is "Cost of Financing" $25,797. (R 16.) We submit that this item should be excluded entirely as forming any part of the reproduction cost accepted by the Court, because there is no evidence, Mss. 12. 13. (R .) that such cost was incurred, or that it necessarily would be incurred in the event of re-construction. Galveston Electric Company v. Galveston, 258 U. S. 388; Wabash Electric Company v. Young, 53 S. C. Reports 234-237; 36 Fed. (2) 254; 58 Fed. (2) 266, approved by this Court in Los Angeles Gas and Electric Company, Appellant v. Railroad Commission of State of California, et al.

Should the Court adopt this suggestion then the depreci-

ated reproduction cost of the Lexington Utilities property, accepted by the Court (R. 84. 85.) at $611,227. should be adjusted by the difference between $26,650. and $6,923, namely: $19,727 and total elimination of Cost of Financing by $25,797., viz:

Value of Lexington Utilities property as accepted by the Court		$611,227.
Less Excess Organization Costs	$19,727.	
Less Cost of Financing	25,797.	45,524.
Reproduction cost (Depreciated as of Dec. 31,: 1926.)		$565,703.

It is submitted that in as much as the original cost of the Lexington Utilities property as of December 31, 1926, was $383,153. (R. 229), following the rule in Smyth v. Ames, 169 U. S. 460. 547, and Georgia Railway & Power Company v. Railroad Commission, 262 U. S. 625; McCardle v. Indianapolis Water Company, 272 U. S. 400, the fair value, or rate base of said property should not exceed $500,000.

AMORTIZATION

"Amortization is the extinction of a debt through a sinking fund." (Standard Dictionary.)

In the instant case, it may be defined as the return to the stockholders of appellant of his investment in addition to the payment of operating expenses, repairs and replacement of

property, compensation for the use of capital in addition to other large reserves. (See R. 213. 217. 225, respecting reserve funds.)

Appellant would use it as a process to force consumers to pay for the 100% maintained properties belonging to it, and also the property belonging to the Lexington Utilitie Company and yet leave ownership and control in the hands of appellant, and after the amortization, either in part, or, as a whole, permit the same stockholders to keep right on collecting returns upon the investment, for which they had been fully, and sometimes doubly, repaid. The record, Mss 13. 14. 15. (R. 16), shows that under the twenty-year franchise, which expired September 5, 1925, appellant was able to retire, out of earnings a bond issue of at least $600,000., and pay to its stockholders, dividends aggregating $1,215,000., on an investment of $1,582,975., after payment of rentals for the use of Lexington Utilities Company property, the actual cost of which was $383,153., as of December 31, 1926. (R. 229.) (Jirgal's testimony.)

The trial court (R. pp. 87-8) in its opinion, made annual allowance as deductible by appellant each year as expense to determine income available for interest and dividends,

1.—($50,000.) per year for amortization of its own properties used in the service of the Lexington, Kentucky district.

2.—($10,263.) per year for amortization of the Lexington Utilities Company's distribution system *leased*

by, and not owned by, the appellant. (See leasing contract printed in a separate pamphlet as an addendum to the R. pages 267-273.)

The laws of the State of Kentucky make no provision for amortization of natural gas utilities and the Railroad Commission of Kentucky is without authority to take it into consideration in the ascertainment of values and the fixation of rates of natural gas service.

The terms of the franchise, which, as stated in appellant's original brief, page 3. "were the result of advance agreement between the City and the Company, and was drawn to fit the situation and facts affecting the appellant," do not provide specifically, or by implication, that the rates to be fixed, as therein set forth, should include as a part of the cost of the service, an amount sufficient to amortize appellant's property, or any part of the property used in the service, during the life of said franchise, or, at any other time.

Appellant's witness, John T. Kimball, whose qualifications have heretofore been set out, predicates appellant's claim of amortization upon three hypothesis, as follows:

1.—"It is a longer period of time than any conservative investor or banker would consider for sinking fund purposes on securities issued against a natural gas enterprise."

2.—"It is impossible to foretell with any degree of accuracy, the life of a natural gas field, especially those of West Virginia and Kentucky. Some of these fields, depending on the rate of depletion, go down very rapidly; others, not drawn on so rapidly,

continue for a longer time. The life of the field, depends not on how much is in the field, but on how much is withdrawn, not only at the present time, but during the future years. Thus, it is a very difficult thing to estimate the natural life of a natural gas utility. You know there is gas there to be sold, but how long it will last, is hard to tell. You can go out and determine with fair accuracy how much gas is in the proven acreage, but to tell whether they will find a new field tomorrow, which will change your entire conclusion, is impossible; so I believe an estimate of this kind should not be predicated on a longer period of more than twenty years over which the Company should recover back the money, put in its equipment, etc."

3.—"The third element I have considered, is for a twenty year period, and at the end of the twenty year period, the Company has no rights whatever in the streets of the City or Lexington, or to serve the consumers therein."

A *hypothesis* may be termed—"*a comprehensive guess; loosely and generally, an unsupported theory; a guess or conjecture.*" (Standard Dictionary.)

These appellees contend that Mr. Kimball's first hpyothesis is not at issue, and were it, the witness is not qualified to testify thereon.

Respecting the second hypothesis, the definition of a hypothesis, as just above stated, would be about as good an answer as can be made, save that the witness entirely overlooks the fact that the Central Kentucky Natural Gas Company, appellant here, may not be considered a natural gas producing utility, therefore, these appellees say

that Kimball's comprehensive guess and unsupported theory, should have been disregarded by the trial Court, and ought to be, and doubtless will be, disregarded by this Honorable Court.

The importance of the question of saddling upon the gas consumers, not alone in Lexington, but in all the communities served by appellant, is too great, in our view, to be treated lightly by these appellees, or by this Honorable Court.

As bearing on the third hypothesis, namely: that at the end of the twenty year period of the franchise, appellant would have no rights whatever in the streets of the City of Lexington or to serve the communities therein. Appellee's desire to say that such claim is untenable, because its right to conduct business in the City of Lexington, after the expiration of the franchise, need not cease. Acts 1920, c. 61, p. 250, Ky. Stats. Sec. 201e-23 of Railroad Commission Act which provides:

> "If upon the expiration of the franchise of any natural gas company, which continues in the service without obtaining a new franchise, such company shall be subject to the jurisdiction and authority of the Railroad Commission and shall not withdraw its service from any municipality, county, or communities without obtaining permission from the Railroad Commission so long as it remains in business in the State of Kentucky, or any part thereof."

This section was upheld in United Fuel Gas Co. v. Railroad Commission of Kentucky, et al., 13 Fed. (2) 510, affirmed 278 U. S. 300, also, City of Ludlow v. Union

Light, Heat and Power Co., 231 Ky. 813. 816. 817.

Appellant voluntarily placed itself under the jurisdiction of the Railroad Commission, under Section 4 of the franchise. Obviously, it will do so, upon the expiration of the franchise if unable to make a satisfactory contract with the City of Lexington, at that time, and thus operate under an indeterminate franchise, with all of the advantages and none of the disadvantages already experienced in the first five years of its life.

Turning to the discussion of Mr. Kimball's second hypothesis, these appellees assert that appellant is not a production, transmission and distribution natural gas utility, but simply a distributor of natural gas; that it purchased during the years 1922 to 1926, both inclusive, more than 90%, and produced less than 10% of the gas that it distributed and sold in the State of Kentucky. (R. 118-a.)

That appellant is not a producer of natural gas is further evidenced by the fact that it contracted with the Petroleum Exploration Company in its effort to comply with Section 23 of the franchise, and if further evidence were necessary that appellant is not a producer of natural gas, to an extent worthy of consideration, we bring to the attention of this Court, appellant's investment in its 'Production System Property', which is shown by page 31 of Kimball Exhibit No. 1, following:

Central Kentucky Natural Gas Company, Inc.
Summary Classified by Accounts

Classification	Estimated Cost of Reproduction as of Dec. 31, 1926. New	Less Deterioration
Organization Costs	$101,600	$101,600
Production System Property:		
Menifee Field—		
Leaseholds	$ 1,975	$ 1,975
Stored Gas	409,663	409,663
Rights of Way	4,971	4,971
Gas Wells	137,800	110,240
Field Lines	169,883	166,486
Other Equipment	532	532
Total Menifee Field	$724,824	$693,867
Red Bush Field—		
Leaseholds	$ 17,875	$ 3,575
Measuring Station Structures	840	699
Measuring Station Equipment	4,135	3,722
Gas Wells	71,132	21,925
Field Lines	37,051	35,939
Total Red Bush Field	$131,033	$ 65,860
Total Production System Property	$855,857	$759,727
Transmission System Property:		
Menifee Compressing Station—		
Land Owned in Fee	$ 100	$ 100
Structures	32,796	26,784
Stable Equipment	210	210
Equipment	152,165	117,613
Total Menifee Compressing Station	$185,271	$144,707
Red Bush Compressing Station—		
Structures	$ 14,759	$ 13,184
Equipment	54,543	50,155
Total Red Bush Compressing Station	$ 69,302	$ 63,339

By page 34, Kimball's Exhibit No. 1, following, we also show Reproduction Cost of all appellant's property, including its 'Production System Property.'

Central Kentucky Natural Gas Company, Inc.
Summary Classified by Accounts

Classification	Estimated Cost of Reproduction as of Dec. 31, 1926 New	Less Deterior ation
General Property:		
Oil City, Pa.		
Office Furniture and Fixtures	$ 1,785	$ 1,509
Construction Overheads:		
Engineering during Construction	$ 131,011	$ 125,557
Legal Expense during Construction	38,298	38,298
Administration Expenses during Construction	59,258	59,258
Taxes, Insurance and Damage during Construction	25,532	25,258
Interest during Construction	199,115	177,870
Total Construction Overheads	$ 453,214	$ 426,515
Cost of Financing	$ 146,028	$ 146,028
Miscellaneous Intangible Capital:		
Going Concern Value	$ 248,000	$ 248,000
Cost of Obtaining New Franchises	50,000	50,000
Total Intangible Capital	$ 298,000	$ 298,000
Working Capital:		
Materials and Supplies	$ 6,551	$ 6,551
Cash Required for Operation	76,449	76,449
Total Working Capital	$ 83,000	$ 83,000
Total Property	$4,044,723	$3,669,400

According to page 31 of Kimball's Exhibit No. 1, the Reproduction Cost Depreciated of appellant's Production System Property as of December 31, 1926, was $759,727., inclusive of 'Over-head Charges,' and without deducting salvage of $28,050. as shown at page 33, Kimball's Exhibit No. 4. Included in said $759,727. is Red Bush Field, Gas Wells and Field Lines aggregating $57,864. which on said page of Exhibit No. 4 are given a remaining life of two years. That sum includes the item of stored gas $409,663. After deduction for stored gas, the net Reproduction Cost Depreciated of the total Production System Property as of December 31, 1926 is $350,064. For good measure, we add 15% 'Construction Over-head Cost' in the sum of $52,510. which results in a total Reproduction Cost Depreciated of said Production System Property of $402,574.

The trial Court fixed the value of appellant's total property at approximately $1,587,000. This sum is equivalent to 43% of $3,669,400. shown by page 34, Kimball's Exhibit No. 1, as the Depreciated Reproduction Cost of appellant's total property. Applying that percentage to the $402,574. total Production System Property results in approximately $174,000., as the value of Appellant's Production System Property, applicable to appellant's business as a whole; and apportioning the aforesaid $174,000. to the Lexington service, using the Court's percentage of 55.1%, results in the sum of $95,875. for Production System Property as useful in the production of natural gas for the service of Lexington. *This*

should convince the Court of appellees' contention that appellant is not a natural gas producing utility.

Appellant did not produce as a witness, one qualified by training and experience as a geologist and practical gas man to support Mr. Kimball's hypothesis. The reason is obvious. As it shown here, the extremely small amount of Production System Property now owned by appellant, and devoted to the production of less than 10% of natural gas, has long since, (R. 213. 217. and 225.) been amortized, and the Lexington consumers of gas have borne their proper share thereof.

The burden of proof was upon appellant to show by competent testimony, that it is a producer of natural gas and not simply a purchaser and distributor of gas. Mr. Kimball's testimony does not measure that requirement.

It may be assumed that the Columbia Gas & Electric Corporation purchased appellant's property as a permanent investment, as well as an additional outlet for natural gas produced by the United Fuel Gas Company, and *not* because it knew appellants would, or were expected to cease business upon the expiration of the franchise in 1947, as testified by the witness, Kimball.

The ownership of appellant by Columbia Gas and Electric Corporation, as well as subsidiary distributing companies, operating in Ohio, is so aptly referred to by the Supreme Court of Ohio in Columbus Gas and Fuel Company v. Public Utilities Commission, 127 O. S. 109, that we are

persuaded to quote as follows:

> BY THE COURT. "The outstanding fact which must first be stated as underlying and conditioning every element involved in this controversy, is as stated in the 1931 annual report of the Columbia Gas and Electric Corporation, that all of the properties involved in this case are 'thoroughly integrated and inter-connected, they constitute a single operating unit'."

This Court may take judicial notice that natural gas is available in Washington, D. C. The source of supply is West Virginia and Kentucky; that the inter-connected, interstate natural gas transmission systems, now in use, and being continually extended farther and farther into new territory, to replace artificial gas, is the best evidence that supplies of natural gas are not diminishing, but to the contrary, are increasing.

In Columbus Gas and Fuel Company v. Public Utilities Commission, supra, it is said:

> * * * "The gas business will continue so long as natural gas can be taken from the earth in the fields controlled by the parent corporation, in paying quantities. History along this line reveals the fact that the testimony of experts as to the probable life of natural gas is unreliable, and it is for this reason that amortization is guesswork. An allowance for amortization, such as contended for by the company would place an unwarranted burden upon the present consumers of gas. The stockholders of the gas company at no time had any right to anticipate that the law would, in addition to dividends, at some time, hand them back their original investment. The nature of the natural gas business, has been precarious at all times; but so long as it has continued to

function, its returns have been reasonably liberal.

Capital does not feel its way to an enterprise in this day and age. Investors investigate the vices and virtues of a proposition before investing. Public utilities, and natural gas companies in particular, advance the theory that they are public servants, furnishing the public with a perishable commodity; that their product is short lived; that when their product dies, they are left with an expensive property that cannot be utilized for other purposes; and that it is only fair, during the life of the company, that its investment should be returned to it by way of amortization.

That the product natural gas will eventually die, is self-evident. When it will die, is an assumption. An assumption is no stronger than the facts that support it, and it is just as fair to assume that much of the equipment now used, in the transportation and distribution of natural gas, will be utilized for the *transportation and distribution of artificial gas in the future*.

We must accredit to the men who organize and manage public utility corporations in which millions are invested, a higher degree of intelligence, and a keener foresight, than that of the ordinary individual. Hence to say, or even to think, that upon the failure of natural gas, the entire property of a natural gas company would be scrapped, would be a puny tribute to those responsible for its conduct."

Premises considered, these appellees believe that upon appellant's own testimony, they have shown that appellant is essentially a utility engaged in the purchase and distribution of natural gas and not a producer of natural gas, and that the life of its business is indeterminate, and not a utility of limited life. Appellant's gas business in Lexington, and for that matter, throughout Kentucky, may therefore, be likened to that of Los

Angeles Gas & Electric Company, decided by this Court, May, 1933, and to that of Wichita Gas Company, (2) Fed. Supp. 792, and to that of the Columbus Gas and Fuel Company, supra.

The Columbus Gas and Fuel Company is a subsidiary of Columbia Gas & Electric Corporation, as is the appellant here. The Columbus Company operates under an indeterminate franchise which, in effect, does appellant. In the cases cited, no claim was made for amortization of any part of the properties used for transmission and distribution of gas. It is true that in the Columbus case, because of the matter of establishing a fair "gate rate" for gas supplies furnished by subsidiaries of Columbia Gas and Electric Corporation, namely: Ohio Fuel Gas Company and United Fuel Gas Company, claim was made for the amortization and/or for depletion of gas lands and wells of the two last named corporations. Although the Public Service Commission of Ohio made allowances as claimed, the Supreme Court of Ohio held that the Commission had committed error.

The fact that Appellant is a part of the Columbia Gas and Electric Corporation system, should be given due consideration by the Court, respecting the matter of an adequate supply of gas being available for an indefinite period of time beyond the prediction of the "*engineer and accountant witness*" Mr. John T. Kimball, by applying the reasoning of Chief Justice Hughes, in Smith v. Illinois Bell Telephone Company, 282 U. S. 133:

"It is evident that in the present case we are not dealing with an ordinary *public utility company*, but with one that is part of a large system, one that is organized for the purpose of maintaining the credit of constituent companies and securing their efficient and economical management."

The franchise contract between appellant and the City of Lexington, (R. 51) provides that at all times, during the life of the franchise, appellant is to supply the City of Lexington and inhabitants with gas, either natural gas, mixed gas or manufactured gas, *but specifically, an adequate supply of natural gas*. The rates and charges are to be fixed and regulated by agreement, or, as provided in Section 201e-1, to 201e-20 inclusive of Kentucky Statutes (Railroad Commission Act.)" Thus, there is provided for an adequate supply of natural gas, or mixed or artificial gas and, as stated in appellant's main brief, page 3, upon terms and conditions that "were the result of advance agreement, between the city and the company, and was drawn to fit the situation and facts affecting appellant."

It is unthinkable that a community of the character, and with the population of Lexington, could or would, be willing to exist without gas service, and under the ownership of appellant, by the Columbia Gas & Electric Corporation, the supply of such gas service is assured for an indefinite period of time beyond the life of the existing franchise.

It should be called to the attention of the Court that the annual allowance of $60,263. made by the trial Court to

amortize appellant's owned, as well as leased property, that sum invested at 4% compound interest over a period of twenty years, would aggregate $1,794,516. In as much as the value of appellant's own property, allocated to the Lexington service, as fixed by the Court, is $1,586,880. appellant would receive that amount and yet have ownership of the property, as well as $207,636. on account of the allowance made to amortize property of the Lexington Utilities Company, to dispose of, and since, under the terms of the lease, between appellant and the Lexington Utilities Company, no provision respecting amortization exists, it is not unlikely that said amount would remain in the hands of appellant.

The sum of $60,263. approximates an assessment upon the 10,000 consumers of gas in Lexington of $6.00 per year, per consumer. In other words, the gas consumers of Lexington would be penalized $6.00 per year each, in order that appellant may have the value of the property owned and the property leased, returned to it, and yet retain ownership and control thereof.

RATE OF RETURN

Appellant's counsel, in their main brief (p. 55) under the heading of "Fair Return" failed to distinguish between a rate that is *confiscatory* and one that is *not fair*. Appellant presented to the Railroad Commission a demand for a 10% return. Appellant cites many cases among which may be found the majority, dating back years. Courts do not agree, and

commissions have been widely divergent in their views. In re Chesapeake & Potomac Telephone Company, Public Utilities Fortnightly of November 10, 1932, page 593, the Commission, facing all the hard facts of the present, said quoting from another opinion, that:

> "What is a fair return * * * can not be settled by invoking decisions of this court made years ago based upon conditions radically different from those which prevail today."

And that:

> "The problem is one to be tested primarily by present day conditions."

And further that:

> "This has reduced the purchasing power of individuals * * *. On the other hand, the dollars so paid to the purveyors will purchase more today than they would in the fairly recent past."

The Commission concluded that:

> "It is our decided opinion that, if rates are established which will enable the Company to earn a rate of return of not less than 6%, upon the rate base as herein determined, such rate of return will, under existing conditions, be entirely fair and reasonable."

At page 59 of appellant's main brief, counsel cited, Wichita Gas Co. v. Public Service Commission of Kansas, decided Jan. 5, 1933, (2) Fed. Supp. 792, but omit to cite the supplemental memorandum of Circuit Judges Phillips and McDermott at p. 799 where the two Judges found it necessary to re-state or rectify as to the rate of return on the fair value

of the utilities property.

In Kankakee Water Company v. Gilbert, et al., pending in U. S. District Court, for Eastern District of Illinois (report not available to us) the water company appealed on the ground of confiscation to the statutory Federal Court and this hearing was upon an application for a temporary injunction. Federal Court did not interfere and said this in respect to the rate of return:

> "(5) Under the existing generally depressed industrial and financial conditions, indicating a greatly abnormal condition both generally and locally, all of which appears in the record, we are not warranted in finding that the probable return of 5.17% upon the valuation as aforesaid furnished by the commission's prescribed rates is confiscatory. In this connection we have considered the evidence of present return in industrial enterprises of other character and that of similar utility companies as well as the fact that plaintiff makes no claim and furnishes no evidence that new capital is at present needed in this business."

Present conditions are not to be disregarded. The business depression which now exists, and of which the Court will take judicial notice, must affect the rate of return to be received by appellant. The past and present conditions have forced the rate of return to private business to lower and lower levels. It is now incumbent upon regulatory commissions and courts to bear in mind these facts and to give merited effect to them. This Court knows the depth of the present financial depression. The rich are already poor, and the poor are desperate. The call now, is for the primal necessities—food, clothing, shelter,

water, light and heat.

We respectfully submit that the Central Kentucky Natural Gas Company should thankfully accept a rate of return less than 7%, as compensatory in the instant case.

EXTRAORDINARY MAINTENANCE

The trial court (R. pp. 87-8.) in its opinion, made annual allowance as deductible by appellant each year as expense to determine income available for interest and dividends;

1. ($10,000.) per year for extraordinary maintenance of its own properties used in the service of the Lexington Kentucky district.

2. ($5,000.) per year for extraordinary maintenance of the Lexington Utilities Company's distribution system *leased by, and not owned by* the appellant. (see leasing contract printed in a separate pamphlet as an addendum to the (R. pages 267-273.)

Here again, Mr. Kimball, witness for appellant interjects a hypothesis for facts. The words, "extraordinary maintenance" used by him, is what is commonly denominated in the public utilities business as "Reserve for Depreciation," and by the Railroad Commission of California in the Los Angeles case recently decided by this Court, as "Depreciation Annuity."

Such a reserve is created for the purpose of renewing and replacing physical depreciable property which is no longer useful because of decrepitude or obsolescence to a state that would not warrant repairs and therefore should be

replaced or renewed. The amount set aside monthly or annually for that purpose is determined by the experience of the utility over a period of years sufficient to enable it to approximate as nearly as may be the amount that should be set aside for that purpose. Such accruals are charged to current operating expense. When a replacement or renewal of physical depreciable property is made, the original cost of such property is charged to the reserve; and any excess cost of such renewal or replacements is charged to capital. This is the course pursued by prudently managed utilities and the books of account should reflect that method clearly and distinctly. The witness Kimball, however, prefers, and does in his testimony, (R. 223.) (Mss. 9) (R [illegible].) resort to the experience of other and larger companies distributing natural gas, such as, the East Ohio of Cleveland and the Logan Gas Company of Ohio—now the Ohio Fuel Gas Company—and also, the Hope Natural Gas Company. He does not show the experience of appellant with respect to the amount expended over a reasonable period of years for renewals and replacements. The reason is obvious. When consideration is given to his testimony (Mss. 9.) where he generalizes "rather expensive replacements of the parts worn out" but fails to specify; and "occasionally the rubber on the couplings which joins the two pipes together must be replaced, that they rot out, and in so doing that the pipes have to be dug up, and that this entails an enormous expenditure, and the couplings have to be kept tight; and the *expenses have to include an*

allowance to cover that sort of replacement work."

Under section 9 of the franchise, appellant agrees to conform its accounting to a uniform classification of accounts prescribed for natural gas utilities by the State Commissions of West Virginia, Ohio and Pennsylvania or either of them. This classification of accounts has been in general use by natural gas companies for many years and it may be assumed that Mr. Kimball was thoroughly conversant therewith; and did know that all of the items mentioned by him are classified under said classification as "Current Operating Expense," to be charged out as such, when incurred.

Inasmuch as the witness failed to show the experience of the company and the necessity under said experience, for an allowance as extraordinary maintenance, it is obvious that the books of account of appellant, do not reflect any charges for renewals or replacements elsewhere than in current operating expense. The conclusion therefore, is inevitable, that appellant charges all repairs, renewals and replacements as current operating expense. Therefore, an additional allowance as claimed under this head would result in a double allowance namely, in that the items having already been charged into operating expense should not again be considered. Appellant having failed to meet the burden of proof, we respectfully submit that the allowance made by the trial Court should be set aside.

IS THE 45c PER M. CU. FT. OF GAS FIXED BY THE RAILROAD COMMISSION OF KENTUCKY, CONFISCATORY?

The mean net operating revenue, available for amortization, depletion, extraordinary maintenance, contingencies, interest and dividends (R. 116a.) last two columns, for the year ended 1926, at a 40c rate, and at a 50c rate, is $237,243. Deducting $75,263. (R. 87, 88.) allowed by the trial court, for amortization and extraordinary maintenance, leaves $161,980, for return on the trial Court's rate base, (R. 84, 85.) of $2,198,107, yields a return of 7.36%. If the Court should adopt these appellees' suggestion, that the rate base of the Lexington Utilities Company property should be $500,000. in place of $611,257. included in the trial Court's rate base (R. 84, 85.) then a revised rate base of $2,086,880. would result and the $161,980. hereinabove set forth, would yield a return of 7.7%.

If this Court should adopt these appellees' suggestion that the allowance for amortization and extraordinary maintenance, made by the trial Court, (R. 87, 88.) in the sum of $75,263. should be disallowed, that sum would be added to the $161,980. net return hereinabove referred to, and thus produce net earnings of $237,243. which equals a return of approximately 10.8% on the rate base fixed by the Court.

CONCLUSION

These appellees summit the following:

1.—That the Court, under the caption Rate Base should disallow the item Cost of Financing and reduce the item of $26,650. Organization Expense and substitute therefor, the amount of $6,993. and should fix the rate base of the Lexington Utilities property, leased by appellant, at not more than $500,000. and that the rate base applicable to Lexington shall not exceed $2,086,880.

2.—That the sum of $60,263. to amortize the property of appellant, owned and leased, fixed by the trial Court, be disallowed.

3.—That the $15,000. fixed by the trial Court, for Extraordinary Maintenance of appellants, owned and leased property, be disallowed.

It is respectfully urged that the Court affirm the decree of the District Court of the United States, Eastern District of Kentucky, refusing to enjoin the award of the Railroad Commission of Kentucky, and to make such further orders as may be necessary to enable that Court to properly dispose of the funds impounded under its order.

We submit the case.

Respectfully,

Maurice H. Thatcher,
Joseph A. Edge,
John H. Connaughton,
Raymond M. Hudson.

Attorneys for Appellees,
Mrs. George Hignight, et al.

November 4, 1933.

SUPPLEMENT TO APPELLEES' FOREGOING BRIEF.

The case has been fairly well stated in the brief for the appellant and appellees, but it will be noted from an examination of the record that a vast amount of the testimony in the lower court and in the Railroad Commission was omitted from the record as brought to this Court, and it is admitted in the brief of appellant (p. 81) that a large amount of the testimony given on that page is omitted, and it is referred to in the City of Lexington brief (pp. 108-10).

It will also be noted that the Court discussed and made findings as to 40c gas and 50c gas, but none as to the rate fixed by the Railroad Commission—45c gas.

The appellant accepts and does not complain of the valuation of its property at $2,198,107.00 as fixed by the Court. (R. 98, Appellant's brief p. 12.) It does not question the amount of income as found by the Court, but does contend that the income found by the Court, on the value that the appellant accepts, as confiscatory.

BRIEF.

When an Appellant omits evidence heard in the lower court it will be presumed that the same justified the decree.

The decree of the lower court is always presumed to be right till the appellant shows from the record that is is erroneous, and when the appellant deliberately leaves out vast quantities of textimony, it is conclusively presumed that such evidence would jutisfy the decree, and this Court cannot reverse a decree under such circumstances.

The findings and opinion of the Court show that the income available for interest and dividends on the 50c rate for 1926 was a fraction less than ten per cent and for 1927 it was substantially seven per cent (a fraction less than seven per cent) which would make the return for average years approximately eight and one-half per cent.

The Court found that the income available for interest and dividends at the 40c rate, from 1922 to 1926, inclusive was slightly less than six per cent, and that the return for 1926, at 50c, was approximately ten per cent, and for 1927, it was substantially seven per cent, one being a mild year and the other a cold year, under the decision in *Los Angeles Gas and Electric Company vs. Railroad Commission*, 299 U. S. 287; 77 L. Ed. 820, at 829 and 837, the average return would be approximately eight and one-half per cent.

If, as found by the Court, the 40c rate produced a little less than six per cent and the 50c rate produced approximately eight and one-half per cent, then the 45c rate fixed by the Railroad Commission would necessarily produce a fraction over seven per cent: This is a necessary conclusion and deduction from the findings and opinion in the lower court.

The lower court based its finding of substantially seven per cent on the one mild year of 1927, and held that it was not confiscatory, but a fair and reasonable return. When, if it had followed the principle since announced in the Los Angeles case, it would have had to take the average year, and it would have had to find, and the necessary conclusion is that it did find, that the 45c rate was fair and reasonable. It found what the facts were, but it applied the wrong principle of law to the facts found in reaching its conclusions. Therefore, as a necessary legal conclusion, it did find, in fact and in law, that the 45c rate would have produced and did produce a little over seven per cent.

A six per cent return on Gas Properties such as is involved in this suit is fair, reasonable and adequate.

This Court has so often held that a six per cent return is sufficient for gas companies, that it seems strange the appellant should contend that seven or seven and one-half per cent is confiscatory. This Court held a six per cent rate is sufficient in three gas cases: They are *Willcox vs. Consolidated Gas Company,* 212 U. S. 19; 53 L. Ed. 382; *Cedar Rapids Gas Light Company vs. Cedar Rapids,* 223 U. S. 655; 56 L. Ed. 594; *Des Moines Gas Company vs. Des Moines,* 238 U. S. 163; 59 L. Ed. 1244.

In *Pacific Gas and Electric Co. vs. San Francisco,* 265 U. S. 403; 68 L. Ed. 1075, the court approved a seven per cent return, and in the *Georgia Railway and Power Co. vs. Railroad Commission,* 262 U. S. 625; 67 L. Ed. 1144, this Court held seven and one-fourth per cent in the gas industry was non-confiscatory, and in *McCardle vs. Indianpolis Water Company,* 272 U. S. 400, that seven per cent was a reasonable return.

The Railroad Commission did not make findings of fact, as under the Statute it was not required to, and it followed the procedure approved by this Court in Wichita Railroad and Light Company Case, 260 U. S. 48.

Certainly, we would submit, that in this grave period of financial turmoil and stress, when nearly every private business enterprise in the country is either "in the red" or in near that condition and unable to make profits, a public utility company, operating under franchise privileges, and whose position is exclusive or monopolistic in effect, and making as the record in this case shows, from seven to ten per cent net on its investment, it should be content with this return, which we earnestly urge under the decision is adequate remunerative and just.

It seems that the decision in the Los Angeles case above justifies, and demands, the sustaining of the Railroad Commission's rate of 45c which would yield an average return

of seven per cent over the period covered by the record; it is presumed reasonable "unless confiscation is clearly established," id. 75 L. Ed. 26, 829, and also by *United Fuel Gas Co. vs. P. U. Commission*, 278 U. S. 300.

CAN THE COURT FIX A RATE?

If this Court should be of the opinion and hold that the lower court exceeded its jurisdiction when it undertook to fix a rate of 50c in lieu of the 45c rate fixed by the Railroad Commission, which later is adequate, as shown by the record, and was not enjoined, then we would respectfully suggest that this Court should modify the lower court decree, to the extent of declaring the fixing of the 50c rate void, and otherwise sustain and affirm the decree and uphold the Railroad Commission rate of 45c.

The Court found as a fact that a 40c rate over average years produced slightly less than 6 per cent, and that a 50c rate over average years produced slightly less than eight and one-half per cent, then by a simple mathematical calculation a 45c rate produced slightly over seven per cent, which this Court and the lower court have both held is not confiscatory, but is reasonable and sufficient; therefore, the decree can be readily modified without any further proceedings. See Los Angeles case above, and *Federal Radio Commission vs. Nelson Railway B & M Co.*, 289 U. S. 266; 77, L. Ed. 608, *Federal Radio Commission vs. General Electric Co.*, 281 U. S. 464, 77, 74 L. Ed. 969, 970.

Therefore these appelles submit that the final decree should be modified, as above, and as modified, affirmed.

Respectfully submitted,

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